WASCO COATINGS MALAYSIA SDN BHD v. NACAP ASIA PACIFIC SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
PRASAD SANDOSHAM ABRAHAM JCA
IDRUS HARUN JCA
[CIVIL APPEAL NO: W-02-2159-10-2013]
3 MARCH 2015

CONTRACT: *Agreement – Settlement agreement – Interpretation of – Agreement entered by parties for purpose of overall settlement of all matters and amounts owed – Obligation to pay balance retention sum – Whether respondents severally and jointly liable to pay retention sum to appellant – Whether appellant's claim premature – Whether appellant precluded from pursuing claim – Whether first respondent's counterclaim for certain sum formed part of total settlement package agreed by parties to agreement – Whether counterclaim allowed*

The Trans Thailand-Malaysia (TTM) Onshore Gas Pipeline Project which consisted of the Thailand and the Malaysian Portions, was carried out for the purpose of the execution, completion and maintenance of the whole of the Trans Thailand-Malaysia (TTM) Project Gas Pipeline, Onshore Pipeline System. Nacap Asia Pacific (Thailand) Co Ltd was awarded the contract to carry out the work for the Thailand Portion of the Project. It entered into an agreement ('the Main Contract No 1') with Trans-Thai Malaysia (Thailand) Ltd to execute, complete and maintain the said Thailand Portion of the project. On 21 June 2004, the appellant and the second defendant entered into a sub-contract for the execution of external and internal coating works to line pipes supplied by the second defendant in respect of the Thailand Portion of the project. The contract for the Malaysian Portion of the project was awarded to the first respondent with the conclusion of an agreement ('the Main Contract No 2') with Trans Thailand (Malaysia) Sdn Bhd. A second sub-contract was entered into between the appellant and the first respondent for the same purpose as in Contract No. 1 of executing external and internal coating works to line pipes supplied by the first respondent in respect of the Malaysian Portion of the project ('Contract No 2'). By a contract entered into between Socotherm (Shashi) Pipe Coating Co Ltd ('SS') and the third respondent, the former agreed to perform for the latter the Horizontal Directional Drilling ('HDD') works for a project known as the Yong Hu Ning Pipeline Onshore Crossing Project China ('Contract No 3'). In another contract entered into between SS and the first respondent, the former agreed to supply to the latter spare parts and consumables related to the HDD works ('Contract No 4'). The third respondent had also entered into a contract with Wah Seong China Limited ('WSCL') whereby both parties agreed to undertake a joint venture for the performance of the HDD works in China ('the joint venture'). On 5 August 2005, the second defendant,

A the first, second and third respondents (collectively referred to as 'NACAP') entered into a settlement agreement with the appellant PPSCS Industries Sdn Bhd (name subsequently changed to Wasco Coatings Malaysia Sdn Bhd), SS and WSCL ('collectively referred to as PPSC') whereby the parties acknowledged owing each other various sums arising out of the execution of
B the works required. The parties agreed that the undertakings and agreements stipulated in the settlement agreement constituted full and final settlement of all matters arising out of or in connection with Contract No 1, Contract No 2, Contract No 3 and Contract No 4, *inter alia*, any and all claims and entitlements to payment, damages, penalties and any other thing whatsoever
C that any individual party of NACAP might have against any individual party of PPSC or any individual party of PPSC might have against any other individual party of NACAP. Pursuant to the settlement agreement, the respondents paid the sum of USD1,001,668.11 to the appellant. It, however, did not pay the appellant the retention sum of USD308,882.76. On the other hand, PPSC did not pay the sum of USD74,717 to NACAP. The appellant
D filed the writ of summons and statement of claim against the respondents and the second defendant claiming for the unpaid retention sum. The respondents and the second defendant filed their statement of defence and the first defendant counterclaimed against the appellant claiming for the said sum of USD74,717. Subsequently, the respondents applied to strike out the
E appellant's claim under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980. The High Court allowed the respondents' application and struck out the appellant's writ of summons and statement of claim. On appeal, the Court of Appeal reversed the High Court's decision and reinstated the appellant's claim against the respondents. The High Court Judge however
F dismissed the appellant's claim and allowed the respondents' counterclaim. Thereafter, the appellant filed the instant appeal before this court against the said decision. The dispute that arose was over the interpretation of the settlement agreement relating to the question whether the respondents were severally and jointly liable thereunder for the retention sum of
G USD308,822.26.

Held (allowing appeal)
Per Idrus Harun JCA delivering the judgment of the court) :

(1) Clause 4(iv) of the settlement agreement requires the payment to be made in accordance with both Contract No 1 and Contract No 2. The
H correct and logical interpretation which could be given to the stipulation was that it merely sought to provide for the manner in which and the time during which the retention money was to be paid. The phrase was not intended to provide for the party which should make and receive the retention sum. In fact cl. 4(iv) had expressly stipulated that 'NACAP
I shall pay PPSC the retention'. To interpret otherwise would run counter to this express and mandatory stipulation. (para 26)

(2) The reason for cl. 4(iv) to require NACAP to pay PPSC 'in accordance with Contract No 1 and Contract No 2' had provided for the mode of and the time for payment of the retention money which must be made in two stages in equal percentage of 50% for each stage. The first payment was required to be made upon the completion of the sub-contract works and the issuance of the certificate of initial acceptance under the main contract while the second payment was required to be made upon the completion of the warranty period. The settlement agreement does not have that stipulation, hence the absence of such stipulation necessitated the payment of the retention sum to be made in accordance with cl. 15.9 of Contract No 1 and Contract No 2. (para 26)

(3) In construing the phrase 'in accordance with Contract No 1 and Contract No 2', it should not be considered in isolation, instead cls. 1 and 4(iv) must be read as a whole together with cl. 15.9 of Contract No 1 and Contract No 2. Thus, the clear meaning and intention of cl. 4(iv) would emerge showing that NACAP should pay the retention sum of USD308,822.76 to PPSC in the manner and during the time stipulated in cl. 15.9 of Contract No 1 and Contract No 2. In the face of the clear meaning and intention of cl. 4(iv), the settlement agreement does not reflect nor does it imply the intention of the parties that the payment of the retention sum was to be paid specifically and only by the paymasters under Contract No 1 and Contract No 2. The obligation to pay the retention sum to the appellant had already been imposed on the second defendant and the first respondent in Contract No 1 and Contract No 2. Thus, since the settlement agreement was entered by the parties for the purpose of an overall settlement of the amounts owed and the loss, it was intended by the parties that the payment of the retention sum was to be made by either one or all of the respondents and the second respondent, the parties to the settlement agreement. The settlement agreement, hence, imposed the obligation on the respondents to be jointly and severally liable to the sum of USD308,322.76 to the appellant. This finding was further augmented by the evidence that the respondents had paid the sum of USD1,001,668 to the appellant pursuant to cl. 4(ii) of the settlement agreement. The payment of the said sum by the respondents was indicative of the intention of the parties to the settlement agreement that all payments payable in cl. 4 were agreed to be made in accordance with the settlement agreement. (para 28-30)

(4) The obligation to pay the balance retention sum arose when the warranty period expired as stipulated in cl. 15.9 of the settlement agreement and not when the certificate of final acceptance was issued by the main client under cl. 15.10 thereof. The said payment in this judgment was based only on cl. 15.9 of Contract No 1 and Contract No 2. The warranty period expired on 15 July 2006 and the balance

retention sum became payable on 15 July 2006. The appellant's claim was thus not premature, and the condition in cl. 15.9 of Contract No 1 and Contract No 2 had been fulfilled. As such, the respondents were liable to pay the sum of USD308,822.76 to the appellant. The appellant was not precluded from pursuing its claim against the respondents as all of them were jointly and severally liable to pay the sum claimed. It was at liberty to pursue the claim and execute the judgment obtained against the respondents either simultaneously or individually as it deemed fit. (paras 38 & 39)

(5) As for the issue of the first respondent's counterclaim for the sum of USD74,717 the said payment formed part of the total settlement package agreed by the parties to the settlement agreement. The obligation to pay the said sum as expressly stipulated in cl. 4(iii) of the settlement agreement lay with the appellant. In this regard, the appellant had rightly conceded that if its claim was allowed, the counterclaim could also be allowed. Since the respondents were liable to pay the balance retention sum to the appellant, there was no hesitation in affirming the judge's decision to allow the counterclaim against the appellant. (para 40)

Bahasa Malaysia *Translation Of Headnotes*

Trans Thailand-Malaysia (TTM) Onshore Gas Pipeline Project yang terdiri daripada Bahagian Thailand dan Malaysia, telah dijalankan bagi tujuan melaksanakan, menyempurnakan dan menyelenggara keseluruhan Trans Thailand-Malaysia (TTM) Project Gas Pipeline, Onshore Pipeline System. Nacap Asia Pacific (Thailand) Co Ltd telah diawardkan kontrak untuk mengendalikan kerja Projek Bahagian Thailand tersebut. Ia memasuki satu persetujuan ('Kontrak Utama No 1') dengan Trans-Thai Malaysia (Thailand) Ltd untuk melaksanakan, menyempurnakan dan menyelenggara Projek Bahagian Thailand tersebut. Pada 21 Jun 2004, perayu dan defendan kedua telah memasuki satu sub-kontrak bagi pelaksanaan kerja-kerja lapisan luaran dan dalaman paip-paip talian yang dibekalkan oleh defendan kedua berkenaan Projek Bahagian Thailand. Kontrak bagi Projek Bahagian Malaysia diawardkan kepada responden pertama dengan kesimpulan satu persetujuan ('Kontrak Utama No 2') dengan Trans Thailand (Malaysia) Sdn Bhd. Sub-kontrak kedua telah dimeterai oleh perayu dan responden pertama untuk tujuan yang sama dalam Kontrak No 1 bagi melaksanakan kerja-kerja lapisan dalaman dan luaran paip-paip talian yang dibekalkan oleh responden pertama untuk Projek Bahagian Malaysia ('Kontrak No 2'). Melalui kontrak yang dimeterai oleh Socotherm (Shashi) Pipe Coating Co Ltd ('SS') dan responden ketiga, SS telah bersetuju untuk menjalankan Horizontal Directional Drilling ('HDD') untuk responden ketiga bagi projek yang dikenali sebagai Yong Hu Ning Pipeline Onshore Crossing Project China ('Kontrak No 3'). Dalam satu kontrak yang lain yang telah dimasuki oleh SS

dan responden pertama, SS telah bersetuju membekalkan kepada responden pertama alat ganti dan bahan guna habis berkaitan dengan kerja-kerja HDD ('Kontrak No 4'). Responden ketiga juga telah memasuki satu kontrak dengan Wah Seong China Limited ('WSCL') di mana kedua-dua pihak telah bersetuju untuk menjalankan usaha sama bagi pelaksanaan kerja-kerja HDD di China ('Usaha Sama'). Pada 5 Ogos 2005, defendan kedua, serta responden pertama, kedua dan ketiga (secara kolektif dirujuk sebagai 'NACAP') memasuki satu persetujuan perjanjian penyelesaian dengan perayu PPSCS Industries Sdn Bhd (nama kemudian ditukar kepada Wasco Coatings Malaysia Sdn Bhd), SS dan WSCL (secara kolektif dirujuk sebagai 'PPSC') di mana pihak-pihak mengakui hutang pelbagai jumlah antara satu sama lain yang berbangkit daripada pelaksanaan kerja-kerja yang diperlukan. Pihak-pihak bersetuju bahawa projek-projek dan perjanjian yang ditetapkan dalam perjanjian penyelesaian membentuk penyelesaian penuh dan muktamad mengenai semua perkara yang berbangkit daripada atau berhubungan dengan Kontrak No 1, Kontrak No 2, Kontrak No 3 dan Kontrak No 4, antara lain, mana-mana dan semua tuntutan dan hak-hak kepada bayaran, ganti rugi, penalti dan apa-apa benda lain yang mana-mana pihak individu NACAP perlu menuntut terhadap mana-mana pihak individu PPSC atau mana-mana pihak individu PPSC perlu menuntut terhadap mana-mana pihak individu NACAP. Berikutan perjanjian penyelesaian, responden-responden membayar jumlah USD1,001,668.11 kepada perayu. Walau bagaimanapun, pihak responden tidak membayar kepada perayu jumlah tahanan USD308,882.76. Sebaliknya, PPSC tidak membayar jumlah USD74,717 kepada NACAP. Perayu memfailkan writ saman dan pernyataan tuntutan terhadap responden-responden dan defendan kedua menuntut jumlah tahanan yang belum dibayar. Responden-responden dan defendan kedua memfailkan pernyataan tuntutan dan defendan pertama memfailkan tuntutan balas terhadap perayu dengan menuntut jumlah USD74,717 tersebut. Responden kemudiannya memohon untuk membatalkan tuntutan perayu di bawah A. 18 k. 19(1)(a), (b), (c) dan (d) Kaedah-kaedah Mahkamah Tinggi 1980. Mahkamah Tinggi membenarkan permohonan responden dan membatalkan writ saman dan pernyataan tuntutan perayu-perayu. Mahkamah Rayuan telah mengakas keputusan Mahkamah Tinggi dan menghidupkan semula tuntutan perayu terhadap responden-responden. Mahkamah Tinggi, walau bagaimanapun, menolak tuntutan perayu dan membenarkan tuntutan balas responden. Berikutnya, perayu memfailkan rayuan di hadapan mahkamah ini terhadap keputusan tersebut. Pertikaian yang timbul adalah berkenaan tafsiran perjanjian penyelesaian berhubungan dengan persoalan sama ada responden-responden adalah secara berasingan dan secara bersesama bertanggungan untuk jumlah tahanan USD308,822.26.

Diputuskan (membenarkan rayuan)
Oleh Idris Harun HMR menyampaikan penghakiman mahkamah:

(1) Klausa 4(iv) perjanjian penyelesaian memerlukan bayaran dibuat mengikut Kontrak No 1 dan Kontrak No 2. Tafsiran yang betul dan logik yang boleh diberikan kepada pensyaratan adalah ia semata-mata

bertujuan untuk mengadakan peruntukan bagi cara dan tempoh masa jumlah tahanan harus dibayar. Frasa itu tidak bertujuan untuk mengadakan peruntukan bagi pihak yang harus membuat dan menerima jumlah tahanan. Malah, kl. 4(iv) telah dengan nyata menetapkan bahawa 'NACAP harus membayar PPSC jumlah tahanan'. Untuk mentafsirkan sebaliknya akan bertentangan dengan pensyaratan yang jelas dan wajib ini.

(2) Alasan untuk kl. 4(iv) bagi memerlukan NACAP membayar PPSC 'menurut Kontrak No 1 dan Kontrak No 2' telah menyediakan cara dan masa untuk bayaran jumlah tahanan yang harus dilaksanakan dalam dua peringkat yang sama rata iaitu 50% bagi setiap peringkat. Bayaran pertama perlu dibuat apabila kerja-kerja subkontrak diselesaikan dan sijil penerimaan awal dikeluarkan di bawah kontrak utama dan bayaran kedua perlu dibuat setelah tamat tempoh jaminan. Perjanjian penyelesaian tidak mempunyai pensyaratan tersebut, oleh itu tanpa pensyaratan sedemikian pembayaran jumlah tahanan perlu dibuat menurut kl. 15.9 Kontrak No 1 dan Kontrak No 2.

(3) Dalam mentaksirkan frasa 'menurut Kontrak No 1 dan Kontrak No 2', ia tidak sepatutnya dipertimbangkan secara berasingan, sebaliknya kl. 1 dan 4(iv) harus dibaca secara keseluruhannya bersama dengan kl. 15.9 Kontrak No 1 dan Kontrak No 2. Oleh itu, niat dan maksud yang jelas kl. 4(iv) akan muncul menunjukkan bahawa NACAP harus membayar jumlah tahanan USD308,822.76 kepada PPSC dalam cara dan masa yang disyaratkan dalam kl. 15.9 Kontrak No 1 dan Kontrak No 2. Dalam menghadapi maksud dan niat yang jelas kl. 4(iv), perjanjian penyelesaian tidak menggambarkan dan juga tidak mengimplikasikan niat pihak-pihak bahawa bayaran jumlah tahanan harus dibayar secara khususnya dan hanya oleh orang yang membayar di bawah Kontrak No 1 dan Kontrak No 2. Kewajipan membayar jumlah tahanan kepada perayu telah dikenakan ke atas defendan kedua dan responden pertama dalam Kontrak No 1 dan Kontrak No 2. Dengan itu, kerana perjanjian penyelesaian dimeterai oleh pihak-pihak bagi tujuan penyelesaian keseluruhan jumlah-jumlah terhutang dan kerugian, adalah niat pihak-pihak bahawa bayaran jumlah tahanan harus dibuat oleh salah satu responden, atau kesemua responden dan responden kedua, pihak-pihak yang terlibat dalam perjanjian penyelesaian ini. Perjanjian penyelesaian, dengan itu, mengenakan kewajipan ke atas responden untuk secara bersesama dan berasingan bertanggungan ke atas jumlah USD308,322.76 kepada perayu. Dapatan ini telah diperkukuhkan lagi oleh keterangan bahawa responden telah membayar jumlah USD1,001,668 kepada perayu menurut kl. 4(ii) perjanjian penyelesaian. Pembayaran jumlah tersebut oleh responden-responden menunjukkan niat pihak-pihak terhadap perjanjian penyelesaian bahawa segala bayaran yang perlu dibayar dalam kl. 4 adalah dipersetujui dilaksanakan mengikut perjanjian penyelesaian.

(4) Kewajipan membayar baki jumlah tahanan timbul apabila tempoh jaminan tamat seperti yang ditetapkan dalam kl. 15.9 perjanjian penyelesaian dan bukan apabila perakuan penerimaan akhir dikeluarkan oleh pelanggan utama di bawah kl. 15.10. Pembayaran tersebut dalam penghakiman ini hanya berdasarkan kl. 15.9 Kontrak No 1 dan Kontrak No 2. Tempoh jaminan dalam penghakiman ini tamat pada 15 Julai 2006 dan baki jumlah tahanan harus dibayar pada 15 Julai 2006. Dengan itu, tuntutan perayu bukanlah pra-matang, dan syarat kl. 15.9 Kontrak No 1 dan Kontrak No 2 telah dipenuhi. Oleh itu, responden bertanggungjawab untuk membayar jumlah USD308,822.76 kepada perayu. Perayu tidak terhalang daripada meneruskan tuntutannya terhadap responden-responden kerana mereka adalah secara bersesama dan secara berasingan bertanggungjawab untuk membayar jumlah yang dituntut. Ia bebas untuk membuat tuntutan dan melaksanakan penghakiman yang diperolehi terhadap responden-responden sama ada secara serentak atau secara individu apabila ia dianggap wajar.

(5) Berkenaan isu tuntutan balas responden pertama untuk jumlah USD74,717, bayaran tersebut membentuk sebahagian daripada pakej penyelesaian yang dipersetujui oleh pihak-pihak kepada perjanjian penyelesaian itu. Kewajipan membayar jumlah tersebut seperti yang jelas dinyatakan dalam kl. 4(iii) perjanjian penyelesaian adalah pada perayu. Dalam keadaan ini, perayu telah dengan betul mengakui bahawa jika tuntutannya dibenarkan, tuntutan balas juga harus dibenarkan. Oleh kerana responden bertanggungjawab untuk membayar baki harga jumlah tahanan kepada perayu, tiada keraguan dalam mengesahkan keputusan Hakim membenarkan tuntutan balas terhadap perayu.

Case(s) referred to:

Export-Import Bank of Malaysia Berhad v. Seeco Engineering for Sewerage and Environmental Company Limited & Ors [2012] MLJU 608 ***(refd)***

Hoh Kiang Ngan & Ors v. Hoh Han Keyet [2013] 5 CLJ 222 CA ***(refd)***

Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d)

For the appellant - Barvina Punnusamy; M/s Jayadeep Hari & Jamil
For the respondents - K Sivabalan; M/s Mastura Partnership

[Editor's note: For the High Court judgment, please see Wasco Coatings Malaysia Sdn Bhd v. Nacap Asia Pacific Sdn Bhd & Ors [2013] 1 LNS 1405 (overruled in part).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Idrus Harun JCA:

[1] This is an appeal against the decision of the learned High Court Judge in dismissing the appellant's claim for the payment of the retention sum of
B USD308,822.76 and allowing the first respondent's counterclaim of USD74,717. We heard both counsels for the appellant and the respondents and accordingly at the conclusion of the arguments allowed the appeal.

[2] Before we go more closely into the reasons for allowing the appeal, it is desirable to lay down some of the material facts. The Trans Thailand-
C Malaysia (TTM) Onshore Gas Pipeline Project which consisted of the Thailand and the Malaysian portions, was carried out for the purpose of the execution, completion and maintenance of the whole of the Trans Thailand-Malaysia (TTM) Project Gas Pipeline, Onshore Pipeline System. Nacap Asia Pacific (Thailand) Co. Ltd. was awarded the contract to carry out the
D work for the Thailand portion of the project. To this end, it entered into an agreement (the main contract No. 1) with Trans Thai-Malaysia (Thailand) Ltd. to execute, complete and maintain the said Thailand portion of the Trans Thailand-Malaysia (TTM) Onshore Gas Pipeline Project. It is to be noted that Nacap Asia Pacific (Thailand) Co. Ltd. was the second defendant in the instant action before the High Court but is not a party in this appeal.
E

[3] On 21 June 2004, the appellant and the second defendant entered into a subcontract for the execution of external and internal coating works to line pipes supplied by the second defendant in respect of the Thailand portion of the project (contract No. 1).

F **[4]** The contract for the Malaysian portion of the project was awarded to the first respondent (the first defendant during the trial) with the conclusion of an agreement (the main contract No. 2) with Trans Thailand (Malaysia) Sdn. Bhd. to execute, complete and maintain the said Malaysian portion of the Trans Thailand-Malaysia (TTM) Onshore Gas Pipeline Project.

G **[5]** On 21 June 2004, a second subcontract was entered into between the appellant and the first respondent for the same purpose as in contract No. 1 of executing external and internal coating works to line pipes supplied by the first respondent in respect of the Malaysia portion of the project (contract No. 2).

H **[6]** By a contract entered into between Socotherm (Shashi) Pipe Coating Co. Ltd (SS) and the third respondent (the fourth defendant during the trial) the former agreed to perform for the latter the Horizontal Directional Drilling (HDD) works for a project known as the Yong Hu Ning Pipeline Onshore Crossing Project, China (contract No. 3).
I

[7] In another contract entered into between SS and the first respondent (the first defendant during the trial) the former agreed to supply to the latter spare parts and consumables related to the HDD works (contract No. 4). A

[8] The third respondent had also entered into a contract with Wah Seong China Limited (WSCL) whereby both parties agreed to undertake a joint venture for the performance of the HDD works in China (the joint venture). B

[9] On 5 August 2005, the second defendant, the first, second and third respondents entered into a settlement agreement with the appellant, SS and WSCL. It has been recited in the settlement agreement that the parties thereto acknowledged owing each other various sums arising out of the execution of the works required under contract No. 1, contract No. 2, contract No. 3 and contract No. 4 and in the joint venture's accounts a loss was indicated with both WSCL and the third respondent agreeing to share the said loss equally. It was for these reasons that the parties negotiated an overall settlement and agreed to consolidate such settlement, including the amounts owed and the loss into the agreement. C D

[10] To this end the parties *inter alia* agreed as follows:

(a) For contract No. 1 and contract No. 2, NACAP agreed to reimburse PPSC the sum of USD2,618,980.62 excluding retention and PPSC accepted such sum as full and final settlement of all matters arising out of or in connection with both contracts (the first settlement amount). In addition to the first settlement amount, the retention sum would be payable from NACAP to PPSC in the sum of USD308,822.76. This is stipulated in cl. 1; E

(b) For contract No. 3, contract No. 4 and the joint venture, by virtue of cl. 2, PPSC agreed to reimburse NACAP the sum of USD767,629 together with a further sum of USD74,717 and which represented 50% of the amount due to be paid to PPSC by the client of the project known as Yong Hu Ning Pipeline Onshore Crossing Project, China and NACAP would accept such sums in the aggregate amount of USD842,346 as full and final settlement of all matters arising out of or in connection with contract No. 3, contract No. 4 and the joint venture (the second settlement amount); and F G

(c) To consolidate the first settlement amount and the second settlement amount into a total settlement, NACAP agreed to pay PPSC the sum of USD1,851,351.62 and PPSC agreed to pay NACAP the sum of USD74,717 and PPSC would accept the aggregate sum of USD1,776,634.62 as full and final settlement of all matters arising out of or in connection with contract No. 1, contract No. 2, contract No. 3, contract No. 4 and the joint venture (the total settlement). This agreement is provided under cl. 3. H I

[11] Pursuant to cl. 4, the parties next agreed for the total settlement to be paid in the following manner:

(a) In sub-cl. 4(i), the parties acknowledged that NACAP had paid PPSC the sum of USD849,683.51 on or about 19 March 2005;

(b) In sub-cl. 4(ii), NACAP should pay PPSC the sum of USD1,001,668.11 within 28 days of the signing of the agreement;

(c) In sub-cl. 4(iii), PPSC should pay NACAP the sum of USD74,717 within 30 days of PPSC receiving such sum or any part thereof from the client of the project known as Yong Hu Ning Pipeline Onshore Crossing Project, China or 24 months after the signing of the agreement irrespective of whether PPSC had received such sum or any part thereof from the client of the said project, whichever should occur earlier; and

(d) In sub-cl. 4(iv), NACAP should pay PPSC the retention sum of USD308,822.76 in accordance with the provisions of contract No. 1 and contract No. 2.

[12] The parties further agreed that the undertakings and agreements stipulated in the settlement agreement constituted full and final settlement of all matters arising out of or in connection with contract No. 1, contract No. 2, contract No. 3 and contract No. 4 *inter alia*, any and all claims and entitlements to payment, damages, penalties and any other thing whatsoever that any individual party of NACAP might have against any individual party of PPSC or any individual party of PPSC might have against any other individual party of NACAP.

[13] Digressing from the narrated account of connected events, we pause to observe at this point that in the recitals to the settlement agreement, the first respondent Nacap Asia Pacific Sdn. Bhd., the second defendant Nacap Asia Pacific (Thailand) Co Ltd, the second respondent Nacap Pipelines (M) Sdn Bhd and the third respondent Nacap Drilling Sdn Bhd of the one part would collectively be referred to as NACAP in the settlement agreement. Of the second part, the appellant PPSC Industries Sdn Bhd, Socotherm (Shashi) Pipe Coating Co Ltd and Wah Seong China Limited would collectively be referred to as PPSC in the settlement agreement. It is also necessary to mention that the appellant subsequently changed its name from PPSC Industries Sdn Bhd to Wasco Coatings Malaysia Sdn Bhd.

[14] In the event, pursuant to the settlement agreement, the respondents paid the sum of USD1,001,668.11 to the appellant. It however, did not pay the appellant the retention sum of USD308,822.76. On the other hand, PPSC did not pay the sum of USD74,717 to NACAP. The reason for the non-payment by PPSC was explained by SP1, Gary Ng Chei How when in his witness statement he said that the appellant did not pay the said sum of USD74,717 because before the payment became due, the respondents had breached their obligation to pay the retention sum under the settlement agreement.

[15] The appellant thereupon filed the writ of summons and statement of claim against the respondents and second defendant claiming for the sum of USD308,822.76 together with interest thereon at the rate of 8% per annum from 15 July 2006 until the date of full settlement and costs. A

[16] The respondents and second defendant filed their statement of defence and the first respondent counterclaimed against the appellant claiming for a sum of USD74,717. B

[17] Subsequently, the respondents on 31 July 2008 applied to strike out the appellant's claim under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980. On 19 November 2009 the High Court allowed the respondents' application and struck out the appellant's writ of summons and statement of claim. On appeal, the Court of Appeal reversed the High Court's decision and reinstated the appellant's claim against the respondents. C

[18] In the course of having the matter heard, the appellant had entered a judgment in default of appearance against the second defendant on 26 May 2011. However the second defendant had been wound up by the Central Bankruptcy Court in Thailand on 2 May 2010. D

[19] The trial of the case then proceeded on 17 June 2013. The learned High Court Judge, on 30 August 2013 dismissed the appellant's claim and allowed the respondents' counterclaim. Thereafter the appellant filed the instant appeal before this court against the said decision. E

[20] Essentially, the learned judge held that cl. 4(iv) of the agreement clearly stipulated the payment of the retention sum was to be made in accordance with contract No. 1 and contract No. 2 which specified who were the respective paymaster and recipient adding that the appellant had failed to prove that the provisions of both contract No. 1 and contract No. 2 had been met. Clause 4(iv) of the settlement agreement did not extinguish or terminate any right or obligation in both contracts and the conditions precedent as set out in cl. 15.10 of both contracts had not been fulfilled. There was no evidence adduced by the appellant on what was the warranty period and guarantee period under contract No. 1 and contract No. 2. Accordingly, the appellant's claim was clearly premature. Her Ladyship further held that there were no joint and/or several liability clauses in the two contracts. F G

[21] We should also mention at this juncture that contract No. 1 and contract No. 2 are identical but for the parties involved. Clause 15.9 of both contracts relates to the payment of the retention money. The appellant claimed that 50% of the retention sum had already been paid to it. The sum claimed was the balance of 50% of the retention sum due and owing under both contract No. 1 and contract No. 2. It is to be observed at this stage that based on the evidence led by the appellant, pursuant to cl. 15.4(a) of both contract No. 1 and contract No. 2, the retention money in the amount of 10% H I

of the value of the works was required to be deducted from any payment due to the appellant. The witness statement of SP1 revealed that the appellant was paid 50% of the retention sum under both contracts leaving the balance of USD308,822.76 constituting 50% of the retention sum to be retained until the completion of the warranty period. The respondents disputed its liability for the said balance of the retention money.

[22] The dispute arose, as we understand it, over the interpretation of the settlement agreement relating to the question whether the respondents were severally and jointly liable thereunder for the retention sum of USD308,822.26. This was the issue ventilated by both the appellant and the respondents before us.

[23] For the appellant, it was contended that the settlement agreement imposed the joint and several obligation to pay the retention sum to the appellant. The respondents however took the opposite position contending that the payment was to be made in accordance with contract No. 1 and contract No. 2 which stipulated who were the respective paymasters and who was the recipient of the sum claimed. Perusal of both contracts reveal that the paymasters for contract No. 1 and contract No. 2 are the second defendant and the first respondent respectively while the recipient is the appellant. Another contentious issue raised before us was whether the appellant had proven its case against the respondents on a balance of probabilities.

[24] To appreciate the contentions that had been canvassed before this court, it would be desirable to refer to the settlement agreement. In our opinion, the clear stipulation in cls. 1 and 4(iv), shows beyond question that NACAP has to pay the retention sum to PPSC. On the other hand, we note that the settlement agreement does not stipulate that the retention sum was to be paid specifically by the second defendant and the first respondent being the paymasters under contract No. 1 and contract No. 2 respectively. The settlement agreement explicitly stipulates that only the parties collectively referred to as NACAP on the one part is obligated to pay any sum due to the other party collectively referred to as PPSC of the other part and vice-versa. Further, the respondents' own and only witness SD1 had admitted to this arrangement during cross-examination. Thus, if the sum of USD308,822.76 was to be paid specifically by the first defendant and the second respondent under contract No. 1 and contract No. 2 as contended by the respondents and decided by the learned trial judge, what then would be the reasons for the parties to include the payment of the said sum in the settlement agreement. We should say that if the respondents' interpretation of cl. 4(iv) of the settlement agreement is correct, such inclusion of the said sum therein would undoubtedly be unnecessary.

[25] In our opinion, it would seem clear that the respondents' argument in this regard was raised in consequence of the introduction of the words "... in accordance with the provisions of contract No. 1 and contract No. 2" into cl. 4(iv) of the settlement agreement which reads as follows:

> (iv) NACAP shall pay to PPSC the Retention in the sum of USD308,822.76 (United States Dollars Three Hundred Eight Thousand Eight Hundred Twenty Two and Cents Seventy Six Only) in accordance with the provisions of Contract No. 1 and Contract No. 2.

[26] When cl. 4(iv) of the settlement agreement requires the payment to be made in accordance with both contract No. 1 and contract No. 2, the correct and logical interpretation which can be given to the stipulation is that it merely seeks to provide for the manner in which and the time during which the retention money was to be paid. The phrase is not intended to provide for the party which should make and receive the retention sum. In fact cl. 4(iv) has expressly stipulated that "NACAP shall pay PPSC the Retention". To interpret otherwise, would in our view, run counter to this express and mandatory stipulation. The reason for cl. 4(iv) to require NACAP to pay PPSC "in accordance with contract No. 1 and contract No. 2" is not difficult to fathom. Clause 15.9 of contract No. 1 and contract No. 2 has provided for the mode of and the time for payment of the retention money which must be made in two stages in equal percentage of 50% for each stage. The first payment was required to be made upon the completion of the subcontract works and the issuance of the certificate of initial acceptance under the main contract while the second payment was required to be made upon the completion of the warranty period. The settlement agreement does not have that stipulation, hence the absence of such stipulation necessitated the payment of the retention sum to be made in accordance with cl. 15.9 of contract No. 1 and contract No. 2.

[27] Further, if it was intended in cl. 4(iv) of the settlement agreement that the respective paymasters in both contracts should pay the recipient of the sum claimed, obviously the clause would not have stipulated that "NACAP shall pay to PPSC the Retention" for the said clause standing on its own without this phrase, would suffice as it would undoubtedly indicate the intention that the payment would be made by the second defendant in contract No. 1 and the first respondent in contract No. 2.

[28] In our judgment, in construing the phrase "in accordance with contract No. 1 and contract No. 2" we must not consider it in isolation, instead cls. 1 and 4(iv) must be read as a whole together with cl. 15.9 of contract No. 1 and contract No. 2. Thus, when the phrase is read in this manner, everything will fall into place and the clear meaning and intention of cl. 4(iv) will emerge showing that NACAP should pay the retention sum of USD308,822.76 to PPSC in the manner and during the time stipulated in cl. 15.9 of contract No. 1 and contract No. 2. In a nutshell, in the face of

the clear meaning and intention of cl. 4(iv), the settlement agreement does not reflect nor does it imply the intention of the parties that the payment of the retention sum was to be paid specifically and only by the paymasters under contract No. 1 and contract No. 2. This is because the obligation to pay the retention sum to the appellant has already been imposed on the second defendant and the first respondent in contract No. 1 and contract No. 2. This could only mean that since the settlement agreement was entered by the parties for the purpose of an overall settlement of the amounts owed and the loss, it was intended by the parties that the payment of the retention sum was to be made by either one or all of the respondents and the second respondent, the parties to the settlement agreement.

[29] The contention of learned counsel for the respondent and the finding of the learned judge in this regard therefore are wholly untenable with the perhaps unfortunate result that it is virtually impossible to reconcile with the stipulation in cl. 4(iv) of the settlement agreement that the retention sum should be paid by NACAP to PPSC. With due respect to the learned judge, Her Ladyship had obviously overlooked or otherwise misapprehended the provision of cl. 4(iv) of the settlement agreement and failed to appreciate the true purport of the settlement agreement which in our judgment is clear and unequivocal. Under the circumstances, we have no hesitation in holding that the settlement agreement imposes the obligation on the respondents to be jointly and severally liable to the sum of USD308,322.76 to the appellant.

[30] Our finding is further augmented by the evidence that the respondents paid the sum of USD1,001,668.11 to the appellant pursuant to cl. 4(ii) of the settlement agreement. SP1 in his witness statement confirmed that the payment was made. It would therefore seem somewhat surprising indeed that the respondents chose not to pay the balance of the retention sum when the sum under cl. 4(ii) was paid by them. The payment of the said sum by the respondents without any doubt is indicative of the intention of the parties to the settlement agreement that all payments payable in cl. 4 were agreed to be made in accordance with the settlement agreement. The learned trial judge with respect, failed to consider this material evidence.

[31] The duty of the court is to construe a contract document as a whole and to determine from its language and any other admissible evidence its true nature and purport (see *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26). In the case of *Hoh Kiang Ngan & Ors v. Hoh Han Keyet* [2013] 5 CLJ 222; [2013] 4 MLJ 199 the Court of Appeal held as follows:

> To arrive at a correct interpretation of any provision in a contract, which will be fair and just, a court is entitled to consider the history or background facts leading to the execution of the contract; In *Bon Chong Hing @ Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd* [2011] 4 MLJ 52; [2011] 6 CLJ 493, His Lordship Abdul Malik Ishak JCA delivering the judgment of the Court of Appeal on the construction and interpretation of an agreement adopted the meaning that best serves the

commercial purpose of the shareholders' agreement. The learned judge applied the business common sense approach which generally favours a commercially sensible construction.

[32] Mindful of this principle of interpretation, the inescapable and logical approach that we should adopt in this appeal is that the settlement agreement ought to be construed by looking at the history, background facts and the reasons leading to the execution of the settlement agreement.

[33] In this regard, the clear and explicit statements in the recitals as we have alluded to earlier, reveal that the parties to the settlement agreement acknowledged the amounts owed to each other arising out of the execution of the works required under contract No. 1, contract No. 2, contract No. 3 and contract No. 4 and the loss which was indicated in the joint venture's accounts. The parties then negotiated an overall settlement and agreed to consolidate such settlement of the amounts owed and the loss into the settlement agreement. Included in the total settlement was the balance of the retention money of USD308,822.76. All the payments in cl. 4 of the settlement agreement were expressly stated to be made by NACAP to PPSC and vice versa. In cl. 5, the undertakings and agreements stipulated in the settlement agreement constitute full and final settlement of all matters arising out of contract No. 1, contract No. 2, contract No. 3 and contract No. 4.

[34] Thus, as the commercial purpose of the settlement agreement was to settle fully the various amounts owed and the loss by the parties to the settlement agreement, and applying the common sense approach which generally favours a commercially sensible construction, the logical and sensible conclusion that can be deduced from the clear terms thereof is that the payment of the sums mentioned in cl. 4(iv) was to be made jointly and severally by the respondents. The fact that the respondents had paid the sum of USD1,001,668.11 lends support to our conclusion. Since the settlement agreement is a consolidation of obligations of the parties to pay under the various contracts and as an overall settlement sum for these contracts, it cannot now be argued that cl. 4(iv) imposes the duty only on the first respondent and the second defendant to pay the balance of the retention sum. In our judgment, to construe the settlement agreement the way the learned judge did would inevitably defeat the manifest object of the settlement agreement. With deference to the learned judge, we find that Her Ladyship had misdirected herself in the fundamental aspect of the case. We accordingly cannot accede to the argument urged for the respondents in support of the learned judge's finding that the settlement agreement does not impose an obligation on the respondents either jointly or severally to pay the sum claimed by the appellant. It is really a wise but unconvincing argument by the respondents brought to bear upon the construction of the settlement agreement despite its plain terms and objects.

[35] We were pressed with the argument for the respondents that the appellant failed to prove its case against the respondents on the balance of probabilities. In fact the learned judge's dismissal of the appellant's claim was also based on this ground. The learned judge had further held that the appellant's claim was premature for the reason that the balance of the retention sum was only to be paid to the appellant once the client under the main contract issued the certificate of final acceptance.

[36] The relevant provisions in contract No. 1 and contract No. 2 relating to the payment of the retention sum are found in cl. 15.9 which reads:

> 15.9. After the completion of the SUB-CONTRACT WORKS and CLIENT'S issuance of the Certificate of Initial Acceptance under the MAIN CONTRACT, the fifty percent (50%) of the retention monies shall be released and the balance shall be retained until the completion of the Warranty Period. In case the Certificate of Initial Acceptance will not be issued under the MAIN CONTRACT due to reasons not attributable to the SUB-CONTRACTOR, the retention money will not be withheld.

[37] It is not disputed by both the respondents and the appellant that the first portion of the retention sum had been paid to the appellant and the claim which is now the subject of this appeal is only for the second portion or balance of the said retention sum. Since the amount in question is the balance retention sum, in view of cl. 15.9, the respondents could only retain the said sum until the completion of the warranty period. An important question to ask therefore is whether the warranty period had expired. However, before this question can be answered, a preliminary question which relates to whether the warranty period was proved by the appellant needs to be addressed first. The learned judge in this regard found that the appellant did not provide what was the warranty period under the main contract No. 1 and the main contract No. 2. It is important to note that cl. 14.3 of contract No. 1 and contract No. 2 provides that the warranty period under the contract shall be equivalent to the warranty period under the main contract. In addition, based on the Performance And Warranty Guarantee Bond (Specimen) which is in Annex II to the settlement agreement, the warranty period is twelve months after the start of regular operations under the main contract. The appellant through SP1 had produced e-mail exchanges between him and one Kelly Oh of the first respondent and in particular the e-mail dated 19 April 2006 (exh. P6) from Kelly Oh to SP1 in which SP1 was informed that as the start of regular operations was effective from 16 July 2005, the warranty period of twelve months expired on 15 July 2006. In fact, SP1's witness statement and his evidence during cross-examination had confirmed that the warranty period expired on the said date. DW1, despite his bare denial that the warranty period expired on 15 July 2006, during cross-examination admitted that the balance of the retention sum was to be paid after the completion of the warranty period and besides exh. P6, there

were no other documents to show that the warranty period ended on another date. The respondents in this regard did not adduce any other evidence to contradict this material evidence save DW1's bare denial. Thus, in the absence of any other evidence to the contrary, we are satisfied that the appellant had adduced sufficient evidence relating to the warranty period which proved beyond any doubt that it had indeed expired on 15 July 2006.

[38] As regards the issue relating to the premature claim, we are satisfied that the obligation to pay the balance retention sum arose when the warranty period expired as stipulated in cl. 15.9 of the settlement agreement and not when the certificate of final acceptance was issued by the main client under cl. 15.10 thereof. In our judgment cl. 15.10 is not relevant in determining the date the obligation to pay the balance retention sum would arise as cl. 15.9 quite clearly stipulates that the balance retention sum would be "retained until completion of warranty period". The said payment in our judgment would not be dependent on cl. 15.10, instead it was based only on cl. 15.9 of contract No. 1 and contract No. 2. The evidence that we have alluded to in the preceding paragraph clearly shows that the warranty period expired on 15 July 2006 and that the balance retention sum became payable on 15 July 2006. Under the circumstances, it is our judgment that the appellant's claim was not premature, the condition in cl. 15.9 of contract No. 1 and contract No. 2 had been fulfilled as such the respondents were liable to pay the sum of USD308,822.76 to the appellant.

[39] We are mindful of the fact that the appellant had already obtained a judgment in default of appearance against the second defendant in respect of this claim and the judgment had not been satisfied. The appellant, in our opinion, is not precluded from pursuing its claim against the respondents as all of them are jointly and severally liable to pay the sum claimed. It is indeed at liberty to pursue the claim and execute the judgment obtained against the respondents either simultaneously or individually as it deems fit (see *Export-Import Bank of Malaysia Berhad v. Seeco Engineering for Sewerage and Environmental Company Limited & Ors* [2012] MLJU 608).

[40] Before leaving the case, it is necessary for this court to deal with the issue of the first respondent's counterclaim for the sum of USD74,717 which the learned judge had allowed. We should say that the payment of the sum of USD74,717, without any doubt, forms part of the total settlement package agreed by the parties to the settlement agreement. The obligation to pay the said sum as expressly stipulated in cl. 4(iii) of the settlement agreement lies with the appellant. In this regard, the appellant had rightly conceded that if its claim is allowed the counterclaim could also be allowed. Since we hold that the respondents are liable to pay the balance retention sum to the appellant, under the circumstances, we have no hesitation in affirming the learned judge's decision to allow the counterclaim against the appellant.

A **[41]** On a critical examination of the whole of the evidence, and for the foregoing reasons, we come to the inevitable conclusion that the instant action under consideration had its merits and the appellant had clearly established its claim on the balance of probabilities against the respondents. In the premises we allow this appeal and set aside the judgment of the learned B judge save Her Ladyship's order on the counterclaim. The respondents shall pay costs of RM50,000 to the appellant here and below and the deposit shall be returned to the appellant.

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